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SYMPOSIUM: RECALLING VICO'S LAMENT: THE ROLE OF PRUDENCE AND RHETORIC IN LAW AND LEGAL EDUCATION

SYMPOSIUM EDITOR
FRANCIS J. MOOTZ III

INTRODUCTION TO RECALLING VICO'S LAMENT:
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IN LAW AND LEGAL EDUCATION *Francis J. Mootz III* 1097

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VICHIAN MORAL PHILOSOPHY:
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Vico discerned in Descartes' method for conducting right reasoning in the sciences a new and completely modern conception of human knowledge. This conception excludes those fields of study that the ancients believed to be the basis of civil wisdom, namely, eloquence or rhetoric and jurisprudence or law. Vico reminds us that what philosophy was for the Greeks, jurisprudence was for the Romans. In accordance with the *Digest*, Vico held that Roman law is civil wisdom itself: all that is necessary for proper human conduct is specified in the law. The law itself must be reasonable and just. The law, or jurisprudence, teaches us the principles of moral philosophy. The art of prudence in human affairs, which is the center of moral philosophy, is learned from the art of jurisprudence.

VICO'S PRINCIPLE OF *SENSUS COMMUNIS*
AND FORENSIC ELOQUENCE *Thora Ilin Bayer* 1131

As professor of Latin eloquence at the University of Naples, Vico instructed young students in the principles of rhetoric joined with the principles of Roman jurisprudence. Vico understood the art of rhetoric as based in the art of topics and the art of memory. The places of memory reside in the *sensus communis*, which is the treasure-house of the images and meanings that underlie the life of all nations. Vico, like Shaftesbury, defines *sensus communis* as "communal sense," the shared sensibilities that exist among a given people, and ultimately among the whole human race. These common sensibilities are the source required for the construction of arguments in all types of rhetoric, including forensic rhetoric. For Vico, *sensus communis* is the key to the interconnection of rhetoric and jurisprudence.

SUBLIME JURISPRUDENCE: ON THE ETHICAL
EDUCATION OF THE LEGAL IMAGINATION
IN OUR TIME

Richard K. Sherwin 1157

The broad dissemination of digital communication technologies is raising disturbing questions about the nature of truth as representation. This epistemological crisis shares an uncanny affinity with the crisis of representation that lay at the heart of the baroque era during the seventeenth century in Europe. The resolution of that crisis, through the work of Descartes and others, came on the heels of a philosophical shift from the image to the sign. However, as Vico presciently realized 300 years ago, Descartes' semiotic model, together with the totalizing rational method that accompanies it, are ill-suited to civic flourishing. Today, signifiers shorn of the signified take the form of mutable digital signs, which proliferate as copies of copies. This mutation of the Cartesian sign into the digital image has coincided with significant political and juridical developments. Individual autonomy, universal reason, and calculative rationality—the traditional foundation for core liberal values, are being challenged by digital practices. Like the baroque crisis of visibility that preceded it, the current crisis of the digital neo-baroque will not ease until confidence is restored, not only in acceptable forms of truth as representation, but also in the mimetic faculty itself, which is to say, in the human capacity to represent self and others. "Sublime jurisprudence" is a metaphysical model that seeks to address this need. Its origin lay in the high rhetorical tradition that lives anew in Vico's ethical education of the legal imagination.

READING VICO FOR THE
SCHOOL OF LAW

Willem J. Witteveen 1197

In his oration *On the Study Methods of Our Time*, Giambattista Vico conceived of the jurist as a person well schooled in law and in rhetoric, able to perform as an orator and a statesman. This ideal contrasts markedly with the modern conception of the lawyer as primarily a rule-technician and a judge. Studying the educational program unfolded by Vico, it becomes apparent that the arts and sciences of oratory, law and philosophy for him converge in the role model of the prudent legislator. This role model has become virtually meaningless in the culture of modern law through an emphasis on the idea of sociolegal positivism which carries the conviction that jurists are functioning as social engineers, especially when they are judges. From Vico we can learn that it is worthwhile to attempt to restore the internal connection between rhetoric and jurisprudence. This could lead to a reform of the law school curriculum. It will be possible to design modern equivalents of the topical method, deriving from the rhetorical tradition. Vico encourages a free use of the resources of the poetic imagination. And a curriculum on these lines warns against confusing all the other arts of language (such as the art of legislation) with the art of interpretation.

RHETORIC AND ITS ABUSES: HOW TO
OPPOSE LIBERAL DEMOCRACY WHILE
SPEAKING ITS LANGUAGE

Guy Haarscher 1225

I try to analyze the rhetoric that is being used in contemporary debates concerning the defense of the values of liberal democracy. My main point is the following: nowadays, human rights and liberal democracy constitute, as it were, the fundamental values of the political sphere. But, as we know, people very often only pay lip service to these political values. Schematically speaking, there are two opposed ways of trying to evade the constraints of human rights and the values of liberal democracy. I shall call the first one the "frontal attack": the "enemy" explicitly defends values that are radically at odds with liberal-democratic principles. Such a rhetoric is very influential today, for instance—but not only—in the Islamic world. As everybody knows, it raises very serious problems for peace and security. But this is not my present topic.

I am interested here in the second, totally opposed, strategy: in order to be at least heard by the democratic community, the "enemy" uses the language of liberal

democratic values. By doing so, he or she very often succeeds in radically distorting the language of human rights. I shall call that strategy: the “Trojan horse,” or, to use another metaphor, “the wolf in sheep’s clothing.” The strategy is fundamentally related to demagoguery and, more subtly, to a sophistical distortion of reasoning. The more we consider the values of liberal democracies to be simple, “clear,” and “distinct,” the less we can see behind these *apparently* unproblematic notions, which so many people *seem* to respect, some hidden controversies, or a sheer manipulation of the language of human rights. In our times, dominated by political correctness, when so many deeply controversial notions are superficially considered clear and distinct, Vico’s lament keeps all its topicality.

VICO’S “INGENIOUS METHOD” AND
LEGAL EDUCATION

Francis J. Mootz III 1261

Recent calls to reform legal education have culminated in the 2007 Carnegie Report, which is attracting substantial attention and promises to have tremendous influence on American law schools. In this article I survey these calls for reform and argue that they should be put into a broader historical, philosophical and ethical perspective. Three hundred years ago the Italian humanist, Giambattista Vico, delivered his famous oration that serves as the focal point for this symposium, *On the Study Methods of Our Time*. This oration lamented the rise of Cartesian critical philosophy at the expense of the cultivation of imagination, prudence, and eloquence. I conclude that Vico’s discussion of law and legal education in the oration provides an incredible resource for the contemporary deliberations regarding law and legal education in the United States.

ON THE (LEGAL) STUDY METHODS OF
OUR TIME: VICO REDUX

Marianne Constable 1303

This essay draws on the form and spirit of Vico’s *On the Study Methods of Our Time* to comment on intellectual and institutional approaches to U.S. legal studies today. It compares rhetoric to the many disciplines—philosophy, economics, sociology, political science, anthropology, poetry, and history—that take law as their subject matter. It argues that law is only partly understood by those who characterize it as command or as morality, as coercive system or as system of rules. It is only partly understood by those who reject law-on-the-books in favor of the empirical study of social behavior. It argues instead that attending to the speech acts of law, and in particular the speech act of claiming, is crucial to understanding law. The essay also shows how current aids to learning in institutions of higher education transform the ways one can know and participate in law. Contemporary educational methods embed students and faculty in an administrative system of service use and provision that epitomizes the ways today’s legal subjects participate more broadly in neo-liberal polities.

LAW AND POLITICS AS PLAY

Lief H. Carter 1333

Liberal theory fails to cope effectively with the common human tendency, under certain conditions, to brutalize other humans. Liberal theory does not adequately accommodate the reality that humans contest concepts of rights, justice, and truth. The necessarily contextual, contested, and contingent character of substantive liberal principles necessarily prevents them, *qua* principles, from effectively inhibiting human brutality. Liberal theory also does not take adequate account of the passionate and non-rational character of the human animal. Giambattista Vico’s remarkably prescient and comprehensive eighteenth century vision of the human condition anticipates these two barriers to achieving liberalism’s pacific political and social vision. Vico suggests that the visceral experiences of competitive human play can, and in fact do, displace the political and social conditions and practices that commonly trigger brutal human behavior. Thus framed, the liberal tradition moves humans from righteousness to playfulness.

STUDENT NOTES AND COMMENTS

LABOR PROVISIONS IN TRADE AGREEMENTS:

FROM THE NAALC TO NOW

Frank H. Bieszczat 1387

Globalization holds the promise of bringing employment and wealth to historically underdeveloped areas. Much of the enthusiasm, though, has been dampened by concerns of low wages and poor working conditions. These concerns have resulted in the inclusion of labor provisions in American free trade agreements, including the inclusion of the North American Agreement on Labor Cooperation (NAALC) as a side agreement to NAFTA. This note argues the labor provisions found in these trade agreements fail to achieve the United States' stated goal of using free trade agreements as vehicles to improve labor conditions globally. Too much responsibility is placed on state actors who do not have the necessary political will to supervise the enforcement of a trading partner's domestic labor laws. Instead, future agreements should place greater emphasis on protecting the right to organize and bargain collectively, and allow the workers to more effectively advocate for themselves.

THE DECLINE OF TRADITIONAL PENSIONS, THE IMPACT OF THE PENSION PROTECTION ACT OF 2006, AND THE FUTURE OF AMERICA'S

DEFINED-BENEFIT PENSION SYSTEM

Joshua Gad-Harf 1409

Congress passed the Pension Protection Act of 2006 to provide economic security for millions of Americans dependent on traditional defined-benefit pension plans, plans where an employer has promised to pay for the retirement of its employees. The bill was necessitated by the many employers who had terminated their plans both inside and outside of bankruptcy protection. This note will discuss the history of the defined-benefit pension system, the ways these plans can be terminated, and the problems these terminations pose for employers, employees, and the American taxpayers. It will argue that the Act and its exceptions for those in the airline industry could be a good first start for protecting those Americans who expected to have a defined-benefit plan as their retirement savings. Nevertheless, there are some glaring deficiencies with the Act, including the fact that it fails to give similar exceptions for other troubled industries, such as the automotive industry. Finally, this note will argue that defined-benefit plans are a dying breed and today's workers must be made to understand that they cannot depend on such plans.

FROM *BORDEN* TO *BILLING*: IDENTIFYING A UNIFORM APPROACH TO IMPLIED ANTITRUST IMMUNITY FROM THE SUPREME COURT'S PRECEDENTS

Jacob L. Kahn 1439

The doctrine of implied antitrust immunity allows courts to reconcile two inconsistent congressional decrees: (1) that unrestrained competition—the primary goal of the antitrust laws—will produce the most efficient results in any marketplace; and (2) that artificial restraints on competition—as achieved through federal regulation—are necessary to ensure the proper functioning of certain industries. Thus, even when Congress has not expressly exempted a defendant's conduct from the antitrust laws, the fact that the conduct occurred in a regulated industry may sometimes be enough to justify an *implied* exemption. Due to the importance of the antitrust laws, however, the Supreme Court traditionally has refrained from granting claims for implied immunity in all but the most exceptional cases. This note examines a recent increase in the number of successful claims for implied antitrust immunity, and argues both that this trend should be reversed, and that the Supreme Court's precedents provide a means for doing so.

IMPALA V. COMMISSION:
CHANGING THE TUNE OF
EUROPEAN COMPETITION LAW

Elena Vranas-Liveris 1497

On July 13, 2006, the European Union's Court of First Instance made history in *Impala v. Commission*, a case which annulled the 2004 decision of the European Commission that cleared the merger between music industry majors Sony and Bertelsmann AG. This was the first time that the Court of First Instance reversed a Commission merger clearance decision. This comment examines the case's internal ramifications for the EU, as well as global ramifications for merger control law generally. This comment concludes that *Impala* marks a major structural change within the EU. By establishing itself as an authority in competition law, the Court of First Instance has checked the once seemingly boundless authority of the European Commission. Furthermore, *Impala* is important globally because it represents policy change in European competition law. Particularly, it raises the standard for merger clearance decisions within the EU and encourages third party participation in competition cases. In all, *Impala* represents a dynamic European competition law.

CORRECTIONS

In the first issue of volume 83, an error was made in Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329 (2008). In the penultimate sentence of the article on page 365, the word “nomocracy” was replaced with “monocracy.”

The sentence should read:

“Nor should the danger be overlooked that overly ambitious attempts by courts to impose nomocracy on the volatile world of international politics may induce powerful actors in the political arena to withdraw their support from the fledgling institutions of international criminal justice.”

In addition, an error was made in Gina M. Bicknell, *To Disclose or Not to Disclose: Duty of Candor Obligations of the United States and Foreign Patent Offices*, 83 CHI.-KENT L. REV. 425 (2008). On page 469, the first two sentences of the first full paragraph should have been attributed to Manny W. Schecter. Only the last sentence of the paragraph was properly quoted.

The editors of the *Chicago-Kent Law Review* sincerely regret these mistakes.

SYMPOSIUM:

Law and Economic
Development in Latin America:
A Comparative Approach
to Legal Reform

Thomas H. Hill
Richard Warner
Symposium Editors

